FILE COPY

FILED
NOV 23 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1949

No. 462

SIMPSON BROS., INC., A CORPORATION,
*Petitioner*

v.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,
*Respondent*

**Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

JOHN F. HILLYARD
*Counsel for Petitioner*

Printed by Law Reporter Printing Co., 518 5th St., Wash., D. C.

## INDEX

### Subject Index


| | PAGE |
|---|---|
| Petition for writ of certiorari | 1 |
| Jurisdiction | 1 |
| Statute involved | 2 |
| Opinion below | 3 |
| Questions presented | 3 |
| Statement | 4 |
| Reasons for the allowance of the writ | 5 |
| Conclusion | 13 |


### Table of Cases Cited


A. M. Webb & Co., Inc. v. Robert P. Miller Co. United States Court of Appeals, Third Circuit No. 9739, Decided July 27, 1949, 176 F. 2d, No. 4 Federal Reporter, Second Series, October 24, 1949, page 679 ..... 12


### Statutes Cited


Price Control Extension Act of July 25, 1946, 60 Stat. 664 ..... 2


### Texts Cited


Congressional Record ..... 6

In The

# Supreme Court of the United States

October Term, 1949

---

No. .....

---

SIMPSON BROS., INC., A CORPORATION,
*Petitioner*

v.

DISTRICT OF COLUMBIA, A MUNICIPAL CORPORATION,
*Respondent*

---

**Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

---

Petitioner, Simpson Bros., Inc., a corporation, trading as the Wakefield Dairy, asks the issuance of a Writ of Certiorari to review the judgment below affirming a decision of the United States District Court for the District of Columbia, which granted a summary judgment herein to the defendant, The District of Columbia, a Municipal Corporation.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254, 2101. The decision below was rendered September 6, 1949 (R. 50).

## STATUTES INVOLVED

The Price Control Extension Act of July 25, 1946, 60 Stat. 664, is as follows:

Sec. 1A:

(b) Declaration of Decontrol Policy.—Therefore, it is hereby declared to be the policy of the Congress that the Office of Price Administration, and other agencies of the Government, shall use their price, subsidy, and other powers to promote the earliest practicable balance between production and the demand therefor of commodities under their control, and that the general control of prices and the use of subsidy shall, subject to other specific provisions of this Act, be terminated as rapidly as possible consistent with the policies and purposes set forth in this section and in no event later than June 30, 1947, and on that date the Office of Price Administration shall be abolished.

(e) Agricultural Commodities—(8)(b) The Price Decontrol Board shall proceed forthwith to consider whether the commodities listed in subparagraph (a) shall continue, after August 20, 1946, to be free from regulation under this Act and the Stabilization Act of 1942, as amended. Such Board, after due notice of a public hearing and full opportunity for representatives of affected industries and consumers to present their views orally or in writing, shall have power to determine whether or not any commodity listed in subparagraph (a) shall be regulated after August 20, 1946, under this Act and the Stabilization Act of 1942, as amended. Such Board shall direct that any such commodity shall not be so regulated unless it finds:

> (i) that the price of such commodity has risen unreasonably above a price *equal to the lawful maximum price* in effect on June 30, 1946, *plus the amount per unit of any subsidy* payable with respect thereto as of June 29, 1946.

(C) If in the case of any commodity listed in subparagraph (A) such Board, on or before August 20, 1946, does direct that such commodity shall not be regulated under such Acts, the Board *may at any subsequent time direct* that such commodity shall *be so regulated if it finds*:

> (i) that the price of such commodity has risen unreasonably above a price *equal to the lawful maximum*

*price* in effect on June 30, 1946, *plus* the amount per unit of any *subsidy* payable with respect thereto as of June 29, 1946.

(D)(10) Whenever maximum prices are in effect for any commodity processed or manufactured in whole or substantial part from any commodity listed in paragraph (8) (A) with respect to which maximum prices are not in effect, *no maximum price*, and no margin, mark-up or discount, *shall be maintained* with respect to such processed or manufactured commodity which does not return to the processors, manufacturers, and *distributors* thereof (A) the *raw material cost* (which must be computed at least once every sixty days at not less that the current cost), (B) the conversion or *distribution cost*, and (C) *a reasonable profit.*

(h) Price Decontrol Board—(3) * * * *Orders of the Board shall not be subject to modification or review by any other department or agency or by any court.*

Sec. 6. (b) When any direct or indirect *subsidy* to an industry is *reduced* or *terminated* or upon recontrol is not restored or is restored only in part, *any maximum price* applicable to the product affected *shall be correspondingly increased.*

Sec. 18 (1) The provisions of this Act shall take affect as of June 30, 1946 * * *.

## COMPLAINT AND OPINION BELOW

The complaint is printed in full in the record at p. 1. The opinion of the District Court is printed on p. 44 of the record. The opinion of the Court of Appeals is not yet reported but will be found at p. 50 of the record.

## QUESTIONS PRESENTED

1. Whether the Decontrol Board, created by Congress, was authorized to act for and instead of the Office of Price Administration.

2. Whether, when the Decontrol Board, made a finding that the increase in the price of milk, after June 30, 1946, was reasonable, and said increase absorbed only the pre-

vious subsidies as guaranteed by the Act of Congress; said action of the Decontrol Board consequently approved the increase, so that the increase came within the perview of the contract involved herein?

3. Was the escalator clause on its face ambiguous?

4. Whether the course of dealings between the parties to this suit and the provisions of the contract showed their intention that if and when subsidies paid by the Government were discontinued, the contract price would be increased.

## STATEMENT

The District Court (Judge Holtzoff) on motions for summary judgment, granted the motion of defendant, holding that the Decontrol Board was not a successor to the Office of Price Administration, stating at the same time, however, that had it been a successor to the O. P. A., plaintiff would be entitled to judgment (R. 45), "Indeed, if the Office of Price Administration had been succeeded by some other agency, or if the powers devolving upon it were transferred to some other agency, the "escalator clause" would apply to any price-fixing action of such other agency. No such situation, however, existed in this case."

The Court of Appeals affirmed (R. 50), and in its opinion stated (R. 54)

> "Assuming, without deciding, that maximum price increases promulgated by agencies in legal effect successors of the O. P. A. could, as a matter of law, be considered "maximum prices as promulgated by the Office of Price Administration" within the terms of the escalator clause, it is clear that neither the Price Decontrol Board nor the Department of Agriculture was in legal effect a successor of the O. P. A. Simpson's contention that these agencies were such successors is unsupported by either reason or authority. Both the Price Decontrol Board and the Department of Agriculture were coexistent with the O. P. A. as reestablished by the Price Control Extension Act. Moreover, the O. P. A. was a price promulgating agency. The

> Price Decontrol Board was not. If it failed to direct that a commodity be not regulated, then maximum prices and regulations and orders under the Emergency Price Control Act as amended were to be applicable; but such prices, regulations and orders were to be those of the O. P. A. not those of the Price Decontrol Board."

The opinions below are disappointing in that they do not give much consideration to the fact that the Emergency Price Control Act of July, 1946, was itself enacted in an emergency. The President of the United States had just vetoed legislation which would have continued the Price Control Act and which included subsidies.

This new legislation, which caused much concern and debate in Congress, had among its principal objectives, guaranteeing industry a reasonable profit. Even if subsidies were to be continued, industry was to be allowed a price that would provide a profit. If subsidies were no longer to be continued, through action of the Decontrol Board, the maximum prices to be set, were to take into consideration the loss of subsidies.

The legislation itself and the debate on the floors of Congress contradict the opinions of the courts below, that the Decontrol Board was not empowered to control prices.

## REASONS FOR THE ALLOWANCE OF THE WRIT

I. This is the first case, to counsel's knowledge, to reach this Court, wherein legislation of Congress creating the Decontrol Board, is prayed to be reviewed and interpreted. Because of the War, and the resulting uncertainty of prices, escalator clauses were inserted in many contracts, to protect the seller and the buyer and to induce sellers to enter into contracts, by guaranteeing them a price increase in line with government decontrol.

The Government had paid billions of dollars in subsidies. Prices fell and rose according to the payment of the subsidies. The vetoing of the Price Control legislation by the President, on June 29, 1946, fell like an atom bomb on in-

dustry. Thousands of contracts, containing escalator clauses, were placed in jeopardy, and the decision of this Court in this case, will effect many litigants throughout this country.

If the Decontrol Board was not a price controlling agency, and both lower courts have said it was not; then what does the following language in the Price Control Extension Act of July, 1946 mean:

Sec. e (Agricultural Commodities (D)(9)

> The Price Decontrol Board shall ALSO HAVE POWER TO DETERMINE, when maximum prices are in effect with respect to any commodity listed in paragraph (8)(A) whether ANY SUBSIDY OR ANY PART THEREOF in effect prior to June 30, 1946, SHALL BE REESTABLISHED IN WHOLE OR IN PART; and the powers of the *Administrator*, the Commodity Credit Corporation, and the Reconstruction Finance Corporation to pay subsidies in connection with such commodity shall BE LIMITED IN ACCORDANCE WITH ANY ORDER OF THE BOARD.

The meaning is clear enough when we recall that other sections of the Act guarantee industry a profit. Therefore, if the Decontrol Board should feel that the maximum price guarantees a profit, it need not reestablish subsidies. If the maximum price is too low, then the Decontrol Board can reorder a subsidy that will guarantee a profit.

The discussions on the floors of Congress should assist in determining what Congress meant by this hurriedly passed emergency legislation. The following is taken from the Congressional Record of July 24th, 1946:

P. 9807

Mr. Aiken.—If price ceilings are reestablished for milk in specific marketing areas, does that mean that products derived from milk, produced in the particular area, would also automatically come under control?

Mr. Barkley.—*The Board would have discretion* in that regard, and so would the Administrator. They are not

required automatically to put everything made from milk under control if *they* put milk in any given region under control *and fix ceiling prices.*

Mr. Aiken.—I think the Senator's interpretation is correct, but I wished to make it clear.

Mr. Barkley.—That is my idea about it. The provision with respect to decontrol is subdivision (B) of paragraph (8) on page 4 of the conference report:

• • (1) that the price of such commodity has risen unreasonably above a price equal to the lawful maximum price in effect on June 30, 1946, plus the amount per unit of any subsidy payable with respect there to as of June 29, 1946. • •

P. 9812

Mr. Wiley.—Then it is clear in the mind of the Senator that the livestock producer, the milk producer, the farmer, is covered so that he is more or less *guaranteed his cost?*

Mr. Barkley.—He is put on the same basis and under the same formula as manufacturers and *processors.*

P. 9814

Mr. Barkley.—I may say that the conference report contains provision for payment of the same amount of subsidies—namely, a billion dollars' worth—and it requires that the subsidies shall end by the 1st of next April, just as was required before. The Secretary will have authority to retain the subsidies until April 1. He is not required to do it, but he has authority to do it.

Mr. Barkley.—That applies to the situation after the enactment of this joint resolution. *They* have the right to go back to June 30 and to pay those subsidies in any case in which a milk producer has not increased the price of his milk, under the advice of the Secretary of Agriculture or the request of the Secretary of Agriculture or if for any other reason he has not done so.

Mr. Aiken.—But the Senator from Kentucky does feel, does he not, that in regard to the milk subsidies, at least, the subsidy payments could be retroactive until June 30?

Mr. Barkley.—Yes. I feel sure that the Secretary can have authority to do that, although he is not required to do so.

Mr. La Follette.—Mr. President, with regard to the provisions of subsection (A) and (B) of Section (8) on pages 4 and 5 of the conference report, as the Senator will recall, the Director of Economic Stabilization on April 15 announced a program for increasing the level of the return to dairy farmers in order to offset higher costs. In that statement he repeated the assurance that the returns to the producers would either be by subsidy or by price. He announced, effective during May and June an increase of 20 cents per hundredweight for milk and 5 cents per pound for butterfat over the subsidy rates paid in the same months of last year. If the Senator will recall, the Director of Economic Stabilization then announced there was to be further increases of subsidy rates of 20 cents and of 5 cents, respectively over last year's levels after July 1 and that these subsidies were to be 40 cents per hundredweight for milk. * * My question is this:

Could those commitments which were made by the Office of Economic Stabilization to go into effect on July 1, be taken into consideration, or would the date fixed in the conference report preclude their consideration. In other words, the program had been announced. Of course the OPA law died, and the program did not go into effect. COULD THE BOARD in taking into consideration the subsidies, consider that what had been in effect was really an order which was put into effect 2 days after its date.

Mr. Barkley.—Those were orders which were to become effective on July 1, but because of the lapse of the law did not.

Mr. La Follette.—That is correct.

Mr. Barkley.—I have no doubt that they would be taken into consideration *in determining the reasonableness or unreasonableness of any price* under that subparagraph.

Mr. La Follette.—In other words, any order that was to go into effect, but which was cut off because of the fact that the law expired, could be put into effect, even

though it was to go into effect on July 1 instead of June 29?

Mr. Barkley.—I think undobtedly it could be taken into consideration in regard to the reasonableness or unreasonableness of any price, and also in regard to any moral obligation which might grow out of the fact that there was an order which was to go into effect on a day when it could not take effect.

P. 9818

Mr. Taft.—• • So unless the prices of dairy products go up more than the subsidy plus the granted increase, there could be no claim that prices had risen unreasonably.

P. 9821

Mr. Taft.—• • The subsidy on dairy products runs 2 cents a quart on milk. In a good many places it runs 3 cents a quart on milk. The *increases* in the *prices* of the *milk* and butter and cheese, *which have taken place recently, have been almost equivalent to the subsidy* very little more.

• • Because of the President's action subsidies were taken off all at once and the increases in the price of food which are widely advertised are largely the result of the removal of the subsidies, which were brought about by the President's veto, not gradually, as we contemplated, but all at once. Of course, the increase in the price of food is not a real increase. It simply means that the increase is paid by the citizen as a consumer instead of as a taxpayer.

P. 9863

Mr. Pepper.—We are not giving the O. P. A. authority to put these controls back. The authority goes to a Decontrol Board. We do not know what the personnel of that Board will be. While we have laid down general policies, in the third paragraph of the standards which are set out to govern the Decontrol Board we have allowed AN ABSOLUTELY UNTRAMMELED AUTHORITY IN THE BOARD to determine whether or not it is in the public interest to put the controls back.

July 23, House. P. 9768

Mr. Koppelmann.—Ceilings on other essential commodities are lifted indefinitely. If they are to be put back, it will not be on authority of OPA but on the decision of THE DECONTROL BOARD. OPA may say ceiling should be restored, the Decontrol Board can say no. OPA may recommend a protective ceiling. THE DECONTROL BOARD CAN FIX ANOTHER CEILING.

II. When subsidies were removed from milk June 30, the price of milk increased 2 cents per quart throughout the country. The Decontrol Board, under the power given it by Congress, held hearings, and presented its findings. The OPA presented evidence at these hearings. As to milk, the Board made the following specific finding (R. 40)

> The information received to date, however, seems to evidence restraint and to show that in general prices have been in the neighborhood of the *June 30 ceiling plus the subsidy*. Therefore the Board has failed to find that the price has risen unreasonably *above the June 30 ceiling plus subsidy*.

Rulings of the Board appear in the Federal Register, Vol. 11, page 9138, Aug. 22, 1946, and the Board refers therein to a statement of its determinations. The statement of its determinations did not appear in the Federal Register, but a copy thereof was filed in the lower Court.

It can be clearly seen from the above, that the Decontrol Board approved the increase of 2 cents in the price of milk. If it did not, it would have reordered control and the payment of subsidies.

Petitioner argues therefore, that the Decontrol Board, having so acted, under the power and authority given it by Congress, placed its stamp of approval on the increase. Futher, that respondent became liable to petitioner, for said increase, under the terms of the contract.

This result was contemplated and directed by the creators of the Price Control Extension Act of July 25, 1946, as borne out by their debates hereinabove set forth.

**III.** It is further submitted that the lower Court erred in stating as a matter of law that the escalator clause involved in the instant case is without ambiguity. The escalator clause states:

> "*Should the maximum prices* as promulgated by the Office of Price Administration, which are in effect on the date of the opening of these bids, *be increased or decreased during the life of the contract, payment will be made* by the District of Columbia at a rate of increase or decrease, *not to exceed* the same ratio that the prices herein quoted bear to the maximum prices authorized by the Office of Price Administration." (Italics supplied)

The lower court construed the above clause as meaning that "if the maximum prices fixed by the Office of Price Administration should be changed *by that agency* then the contract prices should be adjusted accordingly. * * * * * There is no ambiguity in this clause."

However, the clause in short says SHOULD THE MAXIMUM PRICES BE INCREASED OR DECREASED DURING THE LIFE OF THE CONTRACT, PAYMENT WILL BE MADE. This phraseology does not mention the O. P. A. It simply covers increases or decreases in prices which are controlled by the O. P. A. only to the extent that they shall *not exceed* a ceiling promulgated by that agency. There is absolutely no language in the entire contract which requires the milk price to be set by the O. P. A. and the O. P. A. only.

Between July 1st, 1946 and July 26th, 1946, the O. P. A. was non-existent. It is not disputed that an increase in price took place during this period, an increase not arbitrarily made, but an increase which merely offset the subsidy previously paid by the Government. This offsetting of a Government-paid subsidy by an increase in price is exactly what the buyer guaranteed the seller when it incorporated the "escalator clause" in this contract. It is not controverted that the buyer prepared the bid and contract.

As correctly stated by Judge Holtzoff (R. 45) "a contract should be construed as against the party who draws it, in the event of any ambiguity."

The ambiguity of the escalator clause is pronounced when we consider that the lower court decided that an increase would be effective only if the O. P. A. changed maximum prices, whereas the language quoted above from the escalator clause does not even suggest who is to increase or decrease prices.

The District Court (R. 45) stated "Were the Court to extend the "escalator clause" to the situation presented in this case, the Court would be writing a new contract for the parties." In fact, the District Court wrote a new contract for the parties in this case by reading into the escalator clause that a price increase would be effective if promulgated only by the O. P. A.

Another important consideration which the lower courts seemed to overlook in their interpretation of this escalator clause is that even when the O. P. A. acted on maximum prices for milk, any action of the O. P. A. had to be concurrent and with the approval of the Department of Agriculture and the Director of Economic Stabilization.

So, that while the escalator clause only mentioned the O. P. A., in fact three departments of the Government acted concurrently on milk prices, because milk is an agricultural product.

Both parties to this contract were aware of this situation, so that the term O. P. A. always did bring into play a much broader meaning than the designation of a specific governmental agency.

**IV.** The court below (R. 54) stated "In the absence of ambiguity the intent of the parties to a contract must be ascertained from the language thereof without resort to parol evidence or extrinsic circumstances."

The United States Court of Appeals, Third Circuit, in the case of A. M. Webb & Co., Inc., v. Robert P. Miller Co.,

No. 9739, decided July 27, 1949, reported in 176 F. (2d), No. 4, October 24, 1949, page 681 stated:

> We must follow the principle enunciated in many New York decisions that an interpretation is to be avoided which could make a nullity of a bona fide, arm's-length commercial transaction not contrary to public policy. "If the parties have by any course of dealing made it possible for a reasonable man in their position to understand their intention as to the price, it will be fixed by this understanding, based on previous course of dealing as effectually as if stated in words."

The course of dealings between petitioner and respondent was to protect each on increases and decreases in the price of milk, and they inserted the escalator clause in the contract.

This was made necessary because of uncertainty as to subsidies and the resulting actions of governmental agencies.

In the court below, petitioner set forth in its brief, that in the very next contract between these same parties, the words ANY GOVERNMENTAL AGENCY were inserted in the escalator clause in lieu of "Office of Price Administration." The reason therefor was to clear up the ambiguous clause in this contract by precisely setting forth what the parties intended to state all along, namely, that the milk price be properly adjusted in conformity with future action of the United States Government and the departments thereof controlling prices.

## CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

JOHN F. HILLYARD
*Counsel for Petitioner*